

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JOSEPH D. OLVERA, et al.,

Plaintiffs,

v.

R. TUCKER, et al.,

Defendants.

NO: 12-CV-3015-TOR

ORDER GRANTING PARTIAL
SUMMARY JUDGMENT

BEFORE THE COURT are Defendant Michael Hisey's Motion for Summary Judgment (ECF No. 6) and Plaintiff Joseph Olvera's "Request for Judicial Notice of Adjudicative Facts on Return of Service" (ECF No. 26). These matters were heard without oral argument on June 11, 2012. The Court has reviewed the motions, the responses, and the replies, and is fully informed.

BACKGROUND

This is an excessive force lawsuit arising from injuries allegedly sustained by Plaintiff Joseph Olvera during his in-home arrest for possession with intent to

1 distribute a controlled substance. Mr. Olvera alleges that his wrists were injured
2 during his arrest as a result of being restrained in handcuffs that were either too
3 small or applied too tightly. Mr. Olvera's family members allege that they suffered
4 emotional trauma from witnessing Mr. Olvera being restrained and arrested.
5 Defendant Michael Hisey ("Hisey") seeks summary judgment on the ground that
6 Plaintiffs failed to file their claims within the applicable three-year statute of
7 limitations.

8 FACTS

9 Plaintiff Joseph Olvera was arrested in his home on October 23, 2007,
10 pursuant to an arrest warrant for possession of a controlled substance with intent to
11 distribute. During his arrest, Mr. Olvera was placed in handcuffs in the presence of
12 his immediate family members, Plaintiffs Maria L. Olvera (wife), Maria G. Olvera
13 (mother-in-law), Tina Olvera (adult daughter), and Esperanza Lopez.¹ According
14 to Mr. Olvera, the handcuffs in which he was restrained were either too small or
15 applied too tightly, causing severe injuries to his wrists.

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17 ¹ The Amended Complaint lists Plaintiff Joseph Olvera's relationship to Esperanza
18 Lopez as that of a "parental figure." ECF No. 1-1 at ¶ 3.60. The Amended
19 Complaint does not, however, specify whether Plaintiff Esperanza Lopez is an
20 adult or a minor child.

1 1045, 1058 (9th Cir. 2002). This same three-year statute of limitations applies to
2 state law causes of action “for any other injury to the person or rights of another
3 not hereinafter enumerated,” which includes personal injuries arising from another
4 party’s negligence. RCW 4.16.080(2).

5 Washington law provides for tolling of the statute of limitations under
6 certain circumstances. Four such tolling provisions are relevant to the claims
7 raised in this case. First, the statute of limitations is tolled while a person is
8 “imprisoned on a criminal charge prior to sentencing.” RCW 4.16.190(1).
9 Second, the limitations period is tolled until a potential plaintiff reaches age
10 eighteen. RCW 4.16.190(1). Third, the statute is tolled for sixty days following
11 the filing of a tort claim with the State of Washington. RCW 4.92.110. Finally,
12 the statute of limitations on a claim is tolled once a lawsuit is commenced by filing
13 a complaint, provided that service of the complaint is perfected on at least one
14 defendant within 90 days of the date on which the complaint was filed. RCW
15 4.16.170.

16 Here, Hisey contends that the three-year statute of limitations on the claims
17 of Plaintiffs Maria L. Olvera, Maria G. Olvera, Tina Olvera, and Esperanza Lopez
18 expired prior to the filing of Plaintiff’s original complaint on April 13, 2011. The
19 court finds that the statute of limitations as to the claims of Plaintiffs Maria L.

1 Olvera, Maria G. Olvera, and Tina Olvera expired on December 22, 2010.² As
2 Hisey correctly notes, the only applicable tolling period as to these claims is the
3 sixty day period beginning on September 27, 2010, when the Olveras filed their
4 tort claim with the State of Washington. Accordingly, these claims must be
5 dismissed as untimely filed.

6 As to Esperanza Lopez, however, the court finds that the statute of
7 limitations applicable to her claim may have been tolled due to infancy. *See* RCW
8 4.16.190(1). As noted above, Plaintiffs' Amended Complaint does not specify
9 whether Ms. Lopez was a minor or an adult on the date of Mr. Olvera's arrest.
10 Without knowing Ms. Lopez's age as of October 23, 2007, the court cannot
11 calculate the applicable statute of limitations period. Accordingly, Hisey's motion
12 to dismiss this claim is denied with leave to renew.

13 Hisey also challenges Mr. Olvera's claims as untimely filed. According to
14 Hisey, the statute of limitations was tolled for (1) a period of 156 days to account
15 for Mr. Olvera's pre-sentencing incarceration from October 23, 2007 to March 27,

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17 ² December 22, 2010 is sixty days after October 23, 2010. To account for the
18 sixty-day tolling period beginning on September 27, 2010, when the Olveras filed
19 their tort claim with the state of Washington, the court added sixty days to the date
20 on which these claims would have otherwise expired (October 23, 2010).

1 2008; and (2) a period of 60 days beginning when the Olveras filed their tort claim
2 with the State of Washington. Thus, according to Hisey, the statute of limitations
3 on Mr. Olvera's claims expired on May 27, 2011.³

4 Hisey concedes that Mr. Olvera's filed a timely complaint on April 13, 2011,
5 some six weeks before the statute of limitations expired. Nevertheless, Hisey
6 maintains that the claim is now time-barred because Mr. Olvera failed to serve the
7 complaint on at least one defendant within 90 days of the date on which it was
8 filed. In other words, Hisey contends that the filing of Mr. Olvera's original
9 complaint on April 13, 2011 did *not* toll the statute of limitations because Mr.
10 Olvera missed the 90-day deadline for tolling set forth in RCW 4.16.170.

11 The court finds that Hisey's analysis of the statute of limitations on Mr.
12 Olvera's claim is correct. Given that Mr. Olvera did not serve at least one
13 defendant within 90 days of April 13, 2011, the statute of limitations was never
14 tolled by the filing of the original complaint:

15 For the purpose of tolling any statute of limitations[,] an action shall be
16 deemed commenced when the complaint is filed or summons is served[,]
17 whichever occurs first. If service has not been had on the defendant prior to
18 the filing of the complaint, the plaintiff shall cause one or more of the
19 defendants to be served personally, or commence service by publication
20 within ninety days from the date of filing the complaint. If . . . following
filing, service is not so made, the action shall be deemed to not have been
commenced for purposes of tolling the statute of limitations.

³ May 27, 2011 is 216 days after October 23, 2010.

1 RCW 4.16.170. Thus, Mr. Olvera's failure to serve at least one defendant within
2 90 days of April 13, 2011, resulted in the May 27, 2011 statute of limitations
3 remaining in effect. By the time that the Olveras filed their amended complaint on
4 January 17, 2012, the statute of limitations on Mr. Olvera's claim had already
5 expired. Accordingly, this claim will be dismissed as untimely filed.

6 **B. Motion for Judicial Notice**

7 Plaintiff Joseph Olvera has filed a document captioned "Plaintiff's Request
8 for Judicial Notice of Adjudicative Facts on Return of Service Pursuant to FRE
9 201, et seq.," as well as several declarations in support of this request. See ECF
10 Nos. 26-29. In these documents, Mr. Olvera essentially asks the court to recognize
11 his attempts to serve the Amended Complaint on Defendants and to set a case
12 scheduling order. In light of the court's ruling on the statute of limitations issue
13 above—and the Defendants collective agreement to waive service of process—the
14 court finds that Mr. Olvera's efforts to serve the untimely-filed Amended
15 Complaint in February and March of 2012 are irrelevant. Accordingly, the court
16 denies Mr. Olvera's request for judicial notice as moot.

17 **ACCORDINGLY, IT IS HEREBY ORDERED:**

- 18 1. Defendant Michael Hisey's Motion for Summary Judgment (ECF No. 6)
19 is **GRANTED** in part and **DENIED** in part. The claims of Plaintiffs
20

1 Joseph D. Olvera, Maria L. Olvera, Maria G. Olvera, and Tina Olvera
2 against Michael Hisey are hereby **DISMISSED**.

3 2. Plaintiff Joseph D. Olvera's Request for Judicial Notice of Adjudicative
4 Facts on Return of Service (ECF No. 26) is **DENIED** as moot.

5 The District Court Executive is hereby directed to enter this Order and
6 provide copies to counsel.

7 **DATED** this 3rd day of July, 2012.

8 *s/ Thomas O. Rice*

9 THOMAS O. RICE
10 United States District Judge
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